No. 12796

United States
Court of Appeals
for the Ninth Circuit.

BORK MANUFACTURING CO., INC., a Corporation, and ALVIN BORKIN, an Individual and President of Bork Manufacturing Co., Inc.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Transcript of Record

Petition to Review an Order of The Federal Trade Commission

FILED
MAR 12 1954
PAUL P. O'BRIEN,
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12796

United States
Court of Appeals
for the Ninth Circuit.

BORK MANUFACTURING CO., INC., a Corporation, and ALVIN BORKIN, an Individual and President of Bork Manufacturing Co., Inc.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Transcript of Record

Petition to Review an Order of The Federal Trade Commission

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 11, 15

Appearances 1

Certificate of Secretary 30

Complaint 3

Findings as to the Facts and Conclusion 17

Motion to Withdraw Answer and Substitute Admission Answer 14

Notice of Hearings 13

Order Appointing Trial Examiner and Fixing Time and Place for Taking Testimony 12

Order to Cease and Desist 23

Order Closing Case Before Trial Examiner and Transmitting Consent Answer to the Commission 16

Petition to Review an Order of the Federal Trade Commission 32

Proceedings 26

Statement of Points 36

APPEARANCES

JOHN W. BROOKFIELD, JR.,

Attorney supporting the Complaint.

MAXWELL SLOTE,

Attorney for the Bork Manufacturing Co.

United States of America
Before Federal Trade Commission

Docket No. 5525

In the Matter of

BORK MANUFACTURING CO., INC., a Corporation, and ALVIN BORKIN, an individual and President of Bork Manufacturing Co., Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Bork Manufacturing Company, Inc., and Alvin Borkin, an individual, and president of Bork Manufacturing Co., Inc., hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges in that respect as follows:

Paragraph One: Respondent, Bork Manufacturing Co., Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 6201 15th Avenue, in the City of Brooklyn, New York. Respondent, Alvin Borkin, is an individual, and president of said corporate respondent and controls and directs the business activities, sales policies and practices of the

corporate respondent. The respondents have acted in conjunction and cooperation with each other in carrying out the acts and practices hereinafter alleged. Respondents are now and for more than three years last past have been engaged in the manufacture of devices commonly known as push cards and punch boards, and in the sale and distribution of said devices to manufacturers of, and dealers in various articles of merchandise in commerce between and among the various states of the United States, and in the District of Columbia.

Respondents cause and have caused said devices when sold, to be transported from their place of business in the State of New York to purchasers thereof at their points of location in the various states of the United States other than New York, and in the District of Columbia. There is now and has been for more than three years last past a course of trade in such devices by said respondents in commerce between and among the various states of the United States and in the District of Columbia.

Paragraph Two: In the course and conduct of their said business as described in Paragraph One hereof, respondents sell and distribute, and have sold and distributed, to said manufacturers of and dealers in merchandise, push cards and punch boards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Respondents sell and distribute, and have sold and distributed many kinds of push

cards and punch boards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and vary only in detail.

Many of said push cards and punch boards have printed on the faces thereof certain legends or instructions that explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on said push cards and punch boards vary in accordance with the individual device. Each purchaser is entitled to one punch or push from the push card or punch board, and when a push or punch is made a disc or printed slip is separated from the push card or punch board and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card and punch board devices have no instructions or legends thereon but

have blank spaces provided therefor. On those push cards and punch boards the purchasers thereof place instructions or legends which have the same import and meaning as the instructions or legends placed by the respondents on said push card and punch board devices first hereinabove described. The only use to be made of said push card and punch board devices, and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove alleged.

Paragarph Three: Many persons, firms and corporations who sell and distribute, and have sold and distributed candy, cigarettes, clocks, razors, cosmetics, clothing and other articles of merchandise in commerce between and among the various states of the United States and in the District of Columbia, purchase and have purchased respondents' said push card and punch board devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise together with said push cards and punch board devices. Retail dealers who have purchased said assortments either directly or indirectly have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards and punch boards in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the

sale and distribution of said merchandise by means of said push cards and punch boards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

Paragraph Four: The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above alleged, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push cards and punch board devices by respondents as hereinabove alleged supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprise in the sale or distribution of their merchandise. The respondents thus supply to, and place in the hands of, said persons, firms and

corporations the means of, and instrumentalities for, engaging unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

Paragraph Five: The aforesaid acts and practices of respondents as hereinabove alleged are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission on this 9th day of January, A.D., 1948, issued its complaint against these respondents.

NOTICE

Notice is hereby given you, Bork Manufacturing Co., Inc., a corporation, and Alvin Borkin, an individual and president of Bork Manufacturing Co., Inc., respondents herein, that the 13th day of Febraury, A.D., 1948, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this com-

plaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

> In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondents shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.
>
> * * *
>
> Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.
>
> If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will

constitute a waiver of any hearing as to the facts alleged in the complaint and the Commission may proceed to make its findings as to the facts and conclusions based upon such answer and enter its order disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to other intervening procedure, including a hearing upon proposed conclusions of fact or law, in which event he may in accordance with Rule XXIV file his brief directed solely to the questions reserved.

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of fact, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 9th day of January, A.D. 1948.

By the Commission.

[Seal]: /s/ OTIS B. JOHNSON,
Secretary.

Before Federal Trade Commission

[Title of Cause.]

ANSWER

Come now the respondents above named, and in answer to the complaint on file herein, admit, deny, and allege as follows, to wit:

1. Answering paragraph one of said complaint the respondents deny that Alvin Borkin controls and directs the policies of the said Bork Manufacturing Co., inc. It it further denied that in the sale and distribution of their merchandise that they sell and distribute to manufacturers of and dealers in various articles of merchandise.

2. These respondents deny all of the material allegation contained in paragraph two, three, four and five of said complaint.

BORK MANUFACTURING CO., INC.,

By /s/ MAXWELL SLOTE,
Attorney for Respondents.

Received January 30, 1948.

Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 9th day of September, A.D., 1948. Commissioners:

Robert E. Freer, Chairman
Garland S. Ferguson
Ewin L. Davis
William A. Ayres
Lowell B. Mason

[Title of Cause.]

ORDER APPOINTING TRIAL EXAMINER AND FIXING TIME AND PLACE FOR TAKING TESTIMONY

This matter being at issue and ready for the taking of testimony and the receipt of evidence, and pursuant to authority vested in the Federal Trade Comimssion,

It Is Ordered that W. W. Sheppard, a Trial Examiner of this Commission, be and he hereby is designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law;

It Is Further Ordered that the taking of testimony and the receipt of evidence begin on Thursday, September 23, 1948, at ten o'clock in the forenoon of that day (Daylight Saving Time), in Room 500, 45 Broadway, New York, New York.

Upon completion of the taking of testimony and receipt of evidence in support of the allegations of

the complaint, the Trial Examiner is directed to proceed immediately to take testimony and evidence on behalf of the respondents. The Trial Examiner will then close the taking of testimony and evidence and, after all intervening procedure as required by law, will close the case and make and serve on the parties at issue a recommended decision which shall include recommended findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and an appropriate recommended order; all of which shall become a part of the record in said proceeding.

By the Commission:

[Seal] /s/ OTIS B. JOHNSON,
Secretary.

Before Federal Trade Commission

[Title of Cause.]

NOTICE OF HEARINGS

Pursuant to Commission order dated September 9, 1948, hearing for the purpose of taking testimony and receiving evidence in support of the allegations of the complaint in the above matter has been set for September 23, 1948, 10 a.m. D.S.T., Room 500, 45 Broadway, New York, New York.

Please take notice that an additional hearing for the same purpose is hereby set for September

27, 1948, 10 a.m. EST., Room 308, Main Post Office Building, Providence, Rhode Island.

/s/ W. W. SHEPPARD,
Trial Examiner.

September 13, 1948.

To: Maxwell Slote, Esq., 350 5th Avenue, New York, 1, New York.
John W. Brookfield, Jr., Esq., Federal Trade Commission.

Before Federal Trade Commission

[Title of Cause.]

MOTION TO WITHDRAW ANSWER AND SUBSTITUTE ADMISSION ANSWER

Comes now the respondents Bork Manufacturing Co., Inc., and Alvin Borkin, an individual, being the president of said corporation; and move that they be permitted to withdraw the answer filed herein January 30, 1948 and to file the admission answer dated September 22, 1948, and annexed hereto.

Dated: New York, N. Y., September 22, 1948.

BORK MANUFACTURING CO., INC.,

ALVIN J. BORKIN,
President.

By /s/ MAXWELL SLOTE,
Attorney.

Motion concurred in.

/s/ J. W. BROOKFIELD,
Atty. Supporting Complaint.

Received March 14, 1950.

Before Federal Trade Commission

[Title of Cause.]

ANSWER

Comes now the Respondents Bork Manufacturing Co., Inc., a Corporation, and Alvin J. Borkin, an individual and President of Bork Manufacturing Co., Inc., and answering the complaint in this matter, admit all the material allegations of fact charged in said complaint;

Respondents while admitting the facts alleged in said complaint does not admit that said facts constitute a violation of the Federal Trade Commission Act and reserves the right to file a brief within 60 days of the filing of this answer.

/s/ MAXWELL SLOTE,
Attorney for Respondents.

Before Federal Trade Commission

[Title of Cause.]

ORDER CLOSING CASE BEFORE TRIAL EXAMINER AND TRANSMITTING CONSENT ANSWER TO THE COMMISSION

Respondents having been granted permission by the Trial Examiner to withdraw their original answer and substitute therefor an answer admitting all the material allegations in the complaint, and there being no testimony taken, and respondents waiving the Recommended Decision by the Trial Examiner and all intervening procedures,

It Is Ordered that this case be, and the same hereby is, closed for further proceedings before the Trial Examiner as of March 14, 1950.

It Is Further Ordered that under the provisions of Rule XXII, respondents' consent answer undated, filed subject to the condition that any order entered herein be held in abeyance pending final determination of the matter of Harlich Manufacuring Company, Docket No. 4879, and the record herein be, and the same hereby are, transmitted to the Commission for such action as it may deem appropriate.

/s/ W. W. SHEPPARD,
Trial Examiner.

Dated: March 14, 1950.

Received March 14, 1950.

Before Federal Trade Commission

Commissioners: James M. Mead, Chairman
William A. Ayres
Lowell B. Mason
John Carson

[Title of Cause.]

FINDINGS AS TO THE FACTS AND CONCLUSION

Pursuant to the provisions of the Federal Trade Commission Act the Federal Trade Commission, on January 9, 1948, issued and subsequently served its complaint in this proceeding upon respondents, Bork Manufacturing Co., Inc., a corporation, and Alvin Borkin, individually and as president of such corporation, charging said respondents with the use of unfair acts and practices in commerce in violation of the provisions of that Act. After the filing by respondents of their answer to the complaint the trial examiner, theretofore duly designated by the Commission to perform in this proceeding the duties authorized by law, by order in which reference is made to respondents' waiver of further intervening procedure and the filing by the trial examiner of recommended decision granted respondents' motion for permission to withdraw said answer and substitute therefor an answer admitting all of the material allegations of fact set forth in the complaint and reserving in such answer to respondents the right to file brief herein within sixty (60) days after the

filing thereof, which substitute answer was duly filed on March 14, 1950, in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission on the complaint and respondents' substitute answer (no brief having been filed by respondents); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion based thereon.

Findings as to the Facts

Paragraph One: Respondent, Bork Manufacturing Co., Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 6201 15th Avenue, in the city of Brooklyn, New York. Respondent, Alvin Borkin, is an individual, and president of said corporate respondent and controls and directs the business activities, sales policies and practices of the corporate respondent. The respondents have acted in conjunction and cooperation with each other in carrying out the acts and practices hereinafter described. Respondents are now and for more than three years last past have been engaged in the manufacture of devices commonly known as push cards and punch boards, and in the sale and distribution of said devices to manufacturers of, and dealers in, various articles of merchandise in commerce between

and among the various States of the United States, and in the District of Columbia.

Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of New York to purchasers thereof at their points of location in the various States of the United States other than New York, and in the District of Columbia. There is now and has been for more than three years last past a course of trade in such devices by said respondents in commerce between and among the various States of the United States and in the District of Columbia.

Paragraph Two: In the course and conduct of their said business as described in Paragraph One hereof, respondents sell and distribute, and have sold and distributed, to said manufacturers of and dealers in merchandise, push cards and punch boards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Respondents sell and distribute, and have sold and distributed many kinds of push cards and punch boards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and vary only in detail.

Many of said push cards and punch boards have printed on the faces thereof certain legends or instructions that explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on said push cards and

punch boards vary in accordance with the individual device. Each purchaser is entitled to one punch or push from the push card or punch board, and when a push or punch is made a disc or printed slip is separated from the push card or punch board and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less that the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card and punch board devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards and punch boards the purchasers thereof place instructions or legends which have the same import and meaning as the instructions or legends placed by the respondents on said push card and punch board devices first hereinabove described. The only use to be made of said push card and punch board devices, and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said

ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove described.

Paragraph Three: Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase and have purchased respondents' said push card and punch board devices, and pack and assemble and have packed and assembled, assortments comprised of various articles of merchandise together with said push cards and punch board devices. Retail dealers who have purchased said assortments either directly or indirectly have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards and punch boards in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punch boards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

Paragraph Four: The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above described, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push cards and punch board devices by respondents as described herein supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. The respondents thus supply to, and place in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

Conclusion

The aforesaid acts and practices of respondents as herein found are all to the prejudice and injury of the public and constitute unfair acts and prac-

tices in commerce within the intent and meaning of the Federal Trade Commission Act.

By the Commission.

/s/ JAS. M. MEAD,
Chairman.

Issued: October 24, 1950.

Attest:

/s/ D. C. DANIEL,
Secretary.

United States of America
Before Federal Trade Commission

Docket No. 5525

Commissioners: Jame M. Mead, Chairman
William A. Ayers
Lowell B. Mason
John Carson

In the Matter of

BORK MANUFACTURING CO., INC., a Corporation, and ALVIN BORKIN, and Individual and President of Bork Manufacturing Co., Inc.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the substitute answer of respondents, in which answer respondents admitted all the

material allegations of fact set forth in the complaint and reserved the right of filing brief before the Commission, which right, however, has not been exercised by respondents; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It Is Ordered that respondent Bork Manufacturing Co., Inc., a corporation, and its officers, agents, representatives, and employees, and respondent Alvin Borkin, individually and as an officer of said corporation, and his agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Mason concurring in the findings as to the facts and conclusion, but not concurring in the form of order to cease and desist, for the reasons stated in his opinion concur-

ring in part and dissenting in part in Docket 5203—Worthmore Sales Company.

[Seal] /s/ D. C. DANIEL,
Secretary.

Initialed: J. W. M.
L. B. M.
W. A. A.

Issued: October 24, 1950.

Certificate

This is to certify that the following pages and related exhibits are a transcript of hearings before the Federal Trade Commission in the matter of:

Docket No.: 5525
Case Title: Bork Manufacturing Co., Inc., a corporation, and Alvin Borkin, an individual and president of Bork Manufacturing Co., Inc.
Place: New York, N. Y.
Date: September 23, 1948.
Pages Numbered: 1 to 5, inclusive.

which were had as therein appears, and that this is the original transcript thereof for the files of the Commission.

ALDERSON REPORTING COMPANY,
Official Reporters.

By /s/ FRANK McCABE,
Partner.

Before the Federal Trade Commission
Docket No. 5525

In the Matter of

BORK MANUFACTURING CO., INC., a Corporation, and ALVIN BORKIN, an Individual and President of Bork Manufacturing Co., Inc.

September 23,1948.

Met, pursuant to notice, at 10:00 a.m.

Before: W. W. Sheppard, Trial Examiner.

Appearances:

JOHN W. BROOKFIELD, JR.,
Attorney supporting the complaint.

MAXWELL SLOTE,
Attorney for the Bork Manufacturing Co.

PROCEEDINGS

Trial Examiner Sheppard: Come to order, gentlemen.

We will convene the hearing ordered by the Federal Trade Commission in the matter of the Bork Manufacturing Company, Incorporated, a corporation, and Alvin Borkin, an individual and president of the Bork Manufacturing Company, Incorporated, Docket No. 5525, which is convened in Room 500, 45 Broadway, the Commission's office in New York City, at 10 o'clock a.m. this day, the 23rd of September, 1948.

Let the record show that Mr. John W. Brookfield, Jr., attorney of the Federal Trade Commission, is

supporting the complaint in this case; and Mr. Maxwell Slote is the attorney in charge of the respondents' case. His address is 350 Fifth Avenue, New York City.

Now, gentlemen, Mr. Brookfield, of course, knows my procedure in the cases, but Mr. Slote does not. I always like to give an opportunity for counsel to get together as far as possible in all these cases before we go to trial. I understand that in this case there has been some preliminary talk and agreements. Mr. Brookfield, I am ready now to hear what you have before you.

Mr. Brookfield: If your Honor please, Mr. Slote and I conferred at great length yesterday, and we have arrived at an agreement wherein he is submitting an admission answer and a motion to withdraw the answer previously followed; and also a letter to the Commission submitting the terms under which the admission answer is to be filed, the terms being that no order is to be entered in this case against these respondents prior to the decision of the Commission in the Harlich Manufacturing Company case, Docket No. 4859. That, I am informed by my superiors, will be recommended as acceptable to the Commission, as we have done it in several other cases.

Trial Examiner Sheppard: That has been done before, has it?

Mr. Brookfield: Yes.

Trial Examiner Sheppard: You know I am not familiar with what——

Mr. Brookfield (Interposing): I have several

cases in my files right now where similar admission answers have been filed under an agreement that they be not considered by the Commission prior to consideration of the Harlich case; in other words, the purpose being that these people do not want to be put at a disadvantage while the Harlich case is still pending.

Trial Examiner Sheppard: I see.

Mr. Brookfield: Under those circumstances, I ask that this hearing be adjourned. Upon receipt of the admission answer by the Commission, I will notify you and you may close your proceedings.

Trial Examiner Sheppard: Mr. Slote, you have heard Mr. Brookfield's statement. Is that satisfactory to you?

Mr. Slote: Yes, the statement by Mr. Brookfield is accurate and in accordance with our understanding.

Trial Examiner Sheppard: Well, very well, then, gentlemen, I am going to recess this case so as to give the Commission an opportunity to act; and if the Commission does act in accordance with what Mr. Brookfield says, and to which Mr. Slote agrees, there will not be any necessity for any further action in this case.

However, if the Commission does not, of course it will be my duty and Mr. Brookfield's duty to proceed, and you may ask me for another date.

Mr. Brookfield: May I make a further statement?

Trial Examiner Sheppard: Yes.

Mr. Brookfield: I am cognizant, sir, of the fact

that you are authorized to permit the filing of a substitute answer; but in view of the fact that we have this condition attached to it, I did not submit it to you, because I thought you were passing that on to the Commission instead of ruling on it yourself.

Trial Examiner Sheppard: That is right, exactly.

Mr. Brookfield: I would also like the record to show that the subpoenas issued for Mr. Borkin and subpoena duces tecum issued for Mr. Jacobs of the Bork Manufacturing Company, they are discharged therefrom, in view of the fact that we have settled the case.

Trial Examiner Sheppard: That is right, and they can be renewed if the case is renewed.

Mr. Brookfield: Yes.

Trial Examiner Sheppard: In view of the circumstances as stated here, the Examiner will recess this hearing, or rather, adjourn it until the Commission has acted or until I hear from Mr. Brookfield.

We stand adjourned in New York City this date.

(Whereupon, at 10:15 a.m., September 23, 1948, the hearing in the above-entitled matter was adjourned.)

CERTIFICATE OF SECRETARY

Before Federal Trade Commission.

I, D. C. Daniel, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above-entitled matter.

That this transcript is certified to the United States Court of Appeals for the Ninth Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist dated October 24, 1950, issued by the Federal Trade Commission in the above-indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 5th day of February, A.D. 1951.

[Seal] /s/ D. C. DANIEL,
Secretary.

[Endorsed]: No. 12796. United States Court of Appeals for the Ninth Circuit. Bork Manufacturing Co., Inc., a Corporation, and Alvin Borkin, an Individual and President of Bork Manufacturing Co., Inc., Petitioners, vs. Federal Trade Commission, Respondent. Transcript of the Record. Petition to Review an Order of the Federal Trade Commission.

Filed February 7, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12796

BORK MANUFACTURING CO., INC., a Corporation, and ALVIN BORKIN, an Individual and President of Bork Manufacturing Co., Inc.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

To the Honorable, Judges of the United States Court of Appeals for the Ninth Circuit:

Your petitioner, Bork Manufacturing Co., Inc., a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 719 Broadway, New York City, New York, respectfully represents:

I. That your petitioner was on January 9, 1948, a corporation organized under the laws of the State of New York.

II. That on January 9, 1948, the Federal Trade Commission caused its complaint (Docket No. 5525) to be issued against your petitioner attempting to allege the use of unfair methods of competition, unfair acts and practices in interstate commerce in

violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, as amended March 21, 1938, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes." The answer of your petitioner to said complaint was filed thereafter in said proceeding admitting all of the facts alleged in said complaint.

III. That thereafter, November 2, 1950, the Federal Trade Commission served its report and its purported findings as to the facts and conclusion of law and its purported order to cease and desist against your petitioner, which order is in substance as follows:

"It is ordered that the respondent, Bork Manufacturing Co., Inc., or trading under any other name or trading designation, and said respondent's agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from:

> "Selling or distributing in commerce, as commerce is defined in the Federal Trade Commission Act, punchboards, push cards, or other lottery devices, which are to be used, or may be used, in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

IV. That the method of competition and the acts and practices in question and proceeded against were used by your petitioner throughout the United States, including the states of Washington, Oregon

and California, in the circuit of and within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

V. Your petitioner, believing itself aggrieved by said cease and desist order of the respondent and considering it unauthorized, erroneous, void, and unlawfully prejudicial to your petitioner, and your petitioner being without remedy in the premises except in this court as by statute in such cases made and provided, hereby petitions for a review of said order of the commission by this Honorable Court.

Wherefore, your petitioner prays that this Honorable Court exercise its jurisdiction over the parties and subject matter of this petition, and that the order of the commission be set aside.

Your petitioner further prays that this Honorable Court review the findings and order of the Federal Trade Commission in said cause and enter a decree in this Honorable Court setting aside the said order of the Federal Trade Commission against your petitioner and that such other and further orders and decrees be made as to the Court may seem just.

/s/ F. W. JAMES,

/s/ GEO. E. LINDELOF, JR.,
Attorneys for Petitioner.

State of Illinois,
County of Cook—ss.

F. W. James, being first duly sworn on oath, deposes and says that he is an attorney for peti-

tioner; that he has read the above and foregoing petition by him subscribed and knows the contents thereof, and that the same is true in substance and in fact except as to those allegations alleged on belief, and as to those he verily believes them to be true; that he subscribed said petition in his capacity as attorney for the petitioner, Bork Manufacturing Co., Inc., being thereunto duly authorized.

/s/ F. W. JAMES.

Subscribed and sworn to before me this the 26th day of December, 1950.

[Seal] /s/ NICOLAS JOHN MOLITOR,
Notary Public.

My Commission expires March 15, 1951.

[Endorsed]: Filed December 27, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Comes now the petitioners above named and file their statement of points on which they intend to rely:

1. The facts alleged by the Commission in its complaint on file herein are not sufficient to give the Commission jurisdiction to issue a cease and desist order against petitioners.

2. The acts and practices of petitioners are not a violation of the Federal Trade Commission Act.

3. The findings of fact are not sufficient to support the order.

4. The proceeding is not to the interest of the public as required by the F. T. C. Act.

5. The findings of fact and the order are broader than the complaint.

6. The order is too broad.

7. The order entered herein is contrary to and against law.

8. The facts alleged in the complaint are not sufficient to support the order entered herein.

Respectfully submitted,

/s/ F. W. JAMES,
Attorney for Petitioners.

[Endorsed]: Filed February 26, 1951.